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In The
Supreme Court of the United States

DELMA BANKS, JR.,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The State argues that two of Mr. Banks' constitutional claims are barred by procedural defaults and nonexhaustion (of various sorts) because Banks did not try early enough or hard enough to uncover the supporting factual materials that the prosecution suppressed, hid, and lied about throughout the state-court stages of his case; and that Banks' third claim should not be entertained because he proved it in federal court partly through the testimony of a second expert witness in addition to the expert he proffered to prove the same claim in the state courts (which refused to hear any witnesses at all). We devote this reply brief primarily to answering these procedural arguments. The opening Brief for Petitioner amply discusses the constitutional merits.

I. State-Court Development Of The Robert Farr Claim Was Impeded By The State's Persistent Misrepresentations And Deceptions, Not Banks' Lack Of Diligence

Our opening brief demonstrates that the prosecutors' deliberate deceptions concerning Farr's informer status prevented Banks' Due Process claims based upon these very deceptions from being litigated in the trial court. The prosecutors not only chose to run the risk of "tacking too close to the wind," *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); they not only failed to correct or disclose Farr's false testimony – which they knew to be false – that Farr had not served as an informer in this case and had not received anything of value from law enforcement; but the prosecutors themselves steered the jury, the judge and Banks' counsel astray by affirmatively assuring them all that Farr had been completely truthful. And, as our opening brief also shows, the prosecution continued to run cover for Farr in state habeas proceedings: when Banks raised the issue of Farr's informer status, the prosecutor did not respond and reveal that status, but rather ignored the claim and made no disclosure. As a result of this "interference by officials," the truth about Farr "was not reasonably available to [Banks'] counsel," *Murray v. Carrier*, 477 U.S. 478, 488

(1986), and Banks cannot be faulted for failing to know and assert the crucial facts before Farr finally elected – nearly a year after the conclusion of state proceedings – to reveal to Banks' lawyers his paid informant status and his misleading and untruthful testimony. *See also, e.g., [Michael] Williams v. Taylor*, 529 U.S. 420, 435 (2000); *Strickler v. Greene*, 527 U.S. 263, 284 (1999)(when trial counsel rely upon the reasonable expectation that the prosecution will obey its duty to disclose impeachment material, state habeas counsel may properly do the same).

The State's contrary contention that the facts necessary to establish the Farr claim were available during state-court proceedings rests on assertions unsupported by the record.

A. The trial record shows that Banks was tricked into the belief that Farr had no relationship to law enforcement

The State disclaims any responsibility for impeding Banks' efforts to learn of Farr's paid-informer status. Rather, it says, Banks never inquired at trial about Farr's status. SB 8. This is untrue. Banks sought repeatedly to learn the identity of the State's informer, first from Deputy Huff at a pretrial hearing, JA 21-24, and again during trial, when Banks' counsel questioned Farr on this very point. JA 37, 109. Farr denied being a paid informer; and in closing argument, the prosecutor urged the jury to believe Farr. JA 83-84.

The State also suggests that Banks' trial counsel knew Farr was an informer and had acted as such in this case. SB 8. There is no record support for the suggestion.[1] Counsel neither protested nor contested Farr's trial testimony unequivocally

[1]One of the trial prosecutors and its lead investigator testified at the federal hearing. FH Tr. 17-76, 85-90. Neither claimed that Banks' trial counsel, Lynn Cooksey, knew that Farr had served as an informer in Banks' case. The State had Cooksey under subpoena but chose not to call him to testify on this or any other point.

asserting that Farr had *not* served as an informer in Banks' case. At the sentencing hearing, counsel was able to present some evidence to prove a very different point: that Farr had *previously* served as an informant *in another state*. JA 112-13.

Tellingly, the State says little about what the trial record actually shows. It shows that (1) the prosecutors promised before trial to disclose discoverable evidence without litigation; (2) they did not disclose Farr's status;[2] (3) Farr repeatedly denied receiving anything of value from the State; and (4) the prosecutors asserted in closing that Farr was truthful. Thus the State contrived to represent falsely that, whoever the prosecutor's paid informer was, it was *not* Robert Farr.

B. The post-conviction record shows that the prosecution continued the deception, so that Banks remained unable to prove Farr's status and Farr's perjury until state proceedings had concluded

Banks alleged in his 1992 state habeas petition, upon information and belief, that Farr had served as a paid informant and arranged Banks' arrest. JA 180. He made this claim after Charles Cook told the defense, *inter alia*, that Cook had been pressured to testify against Banks, JA 192-93,[3] and another witness said she thought Farr was "well-connected to law enforcement people." JA 195. Trial prosecutor Elliott

[2]The State relies on *Roviaro v. United States*, 353 U.S. 53 (1957), and similar cases to argue that it was not required to disclose Farr's informer status. SB 18. These cases deal with a wholly different issue: when the government is required to reveal the identity of an undercover informer it does *not* call as a trial witness. Once the State elected to call Farr as a witness, it was plainly required to reveal his status and any consideration made to him. *United States v. Bagley*, 473 U.S. 667, 676 (1985). And when Farr proceeded to mislead the jury by denying his status, the prosecutors were required to correct this false testimony. *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957). Instead, they ratified and exploited it.

[3]Cook was reticent to speak to the defense and thereafter refused to do so until July, 1998.

represented the State in the state habeas proceedings; he had first-hand knowledge that Farr had in fact served as a paid informant, 6FH 54; but in answering the petition, Elliott chose to say nothing in response to this allegation he knew to be true.

The State now claims that if Banks' counsel had been diligent, Banks could have obtained and presented evidence of Farr's status during the state post-conviction proceedings, despite Elliott's taciturnity. Specifically, the State faults counsel for not seeking to interview Farr or obtain discovery from Deputy Huff to support the allegations in the state petition. However, Farr was nowhere to be found at that time because, on the advice of his law enforcement contacts, he "retired" as an informer and – having been told by the police that his life was in danger – he moved out of Texas and settled in southern California. JA 444. Like Charles Cook, he was fleeing contact with anybody representing prisoners he had testified against. He became willing to speak to Banks' representatives only long after state proceedings had concluded. *Id.*[4] As for seeking discovery of Farr's status from Deputy Huff, Banks' state post-conviction counsel had no information to justify such discovery.[5] *See* [*Michael*] *Williams v. Taylor*,

[4]The State characterizes Farr's reticence to speak prior to the conclusion of state proceedings as "dubious" and asks the Court not to credit it. SB 8. The Magistrate Judge did credit it, *see* 5FH 4132-33, and there is no reason not to. Farr testified by declaration without objection by the State, and the State was offered but declined the opportunity either to cross-examine him on deposition or to require that he testify in person.

[5]Notably, when Banks initially moved for discovery in federal court prior to filing Farr's declaration, the State successfully urged the Magistrate Judge to deny discovery by arguing (FH 573) that:

> . . . Banks has offered no specific factual allegations tending to show that Farr was in fact a police informant in Banks' case, and that Farr "set up" Banks' arrest. Although Banks claims that Officer Willie Huff testified during a pretrial hearing [footnote omitted] that a confidential informant had advised him that Banks was traveling to Dallas to obtain a weapon, absolutely nothing indicates that this informant was Farr. All Banks has come up with is that Farr had once acted as an informant a couple of times for an Arkansas State Police Officer, Gary Owen, some years prior to Banks' trial [citation and footnote omitted]. Because Banks has failed to allege specific, non-conclusory facts stating a *prima facie* claim for relief, he has not shown good cause for discovery . . . .

And even if Banks had been granted access to the District Attorney's file to hunt for evidence showing that Farr provided paid-informer services in his case, he would have found none. After such discovery was granted in federal habeas, a review of the file showed not one word identifying Farr as the informant in this case. *See* 3FH 699.

[6]Given Huff's adamant refusal to identify his informant during trial hearings, Banks' counsel had every reason to believe that Huff would not speak about such matters unless compelled to do so while testifying under subpoena at a hearing.

[7]*See, e.g.*, [*Michael*] *Williams v. Taylor*; *Strickler v. Greene*; *Kyles v. Whitley*; *Amadeo v. Zant*, 486 U.S. 214, 222, 224 (1988).

529 U.S. 420, 442-43 (2000). The state habeas judge had also served as the trial judge. Like Banks, he had heard Farr repeatedly deny receiving consideration for law-enforcement services in Banks' case, and he had heard the prosecutors specifically vouch for Farr's credibility. Moreover, when Banks sought discovery on his *Swain v. Alabama*, 380 U.S. 202 (1965), and *Brady v. Maryland*, 373 U.S. 83 (1963), claims, as to which he *was* able to proffer supporting evidence, the state judge wholly ignored the motion and never ruled on it. *See Lee v. Kemna*, 534 U.S. 362, 381 (2002). The state judge similarly disregarded Banks' motion for an evidentiary hearing that would have given Banks a forum for subpoenaing witnesses, including Huff.[6]

This Court has consistently permitted federal habeas consideration of claims and evidence not presented to the state courts when their state-court development was thwarted by state interference less egregious than that in the present case.[7] Here the record is clear that the State and its agents successfully plotted to conceal Robert Farr's paid-informer status from Banks and his lawyers throughout the state-court process, both by stonewalling and by affirmative deceit in flagrant violation of Due Process. The State should not now be heard to claim

that the federal courts are powerless to remedy the Due Process violation precisely because its deceit did succeed.

II. The District Court Correctly Upheld Banks' *Strickland* Claim, Finding Prejudice Established By Properly Exhausted Evidence

The State faults the District Court's grant of relief under *Strickland v. Washington*, 466 U.S. 668 (1984), by arguing primarily that certain facts relied upon by Banks to establish prejudice were unexhausted and that Banks' overall showing of prejudice resulting from defense counsel's failure to develop available mitigating evidence is insufficient. Both arguments disregard the record and controlling case law.

A. The substance of the claim was fairly presented to the state courts

Banks pleaded the same comprehensive claim of ineffective assistance of counsel in state court and in federal habeas. In support of his state petition, he requested a hearing and proffered much of the evidence he later presented at the federal hearing. The State urged that the state petition be summarily denied. It made no effort to contest Banks' proffered mitigation evidence but rather argued that trial counsel's performance satisfied Sixth Amendment performance standards. JA 235-39. The state court denied the claim summarily on the latter ground.

A review of Banks' proffers in the state court reveal that they included, root and branch, exactly what he later presented to the federal court. The proffers took the form of affidavits by Dr. Gregorio Pina and by Demetra Jefferson.

1. Dr. Pina's affidavits

The State now argues that Dr. Pina's affidavits only "vaguely suggest" that Banks was physically abused as a child. SB 30. But in fact there is nothing vague about Pina's account of Banks' traumatic experience of child abuse. Dr. Pina

explicitly submitted his affidavits to document Banks' claim that if Banks' trial lawyer, Cooksey, had done "anything to investigate the mental condition of [his] client . . . ," "he would have found that Mr. Banks suffered from a number of problems which could have had a tremendous impact on issues at both stages of the trial." JA 158. Dr. Pina recounted that "Mr. Banks experienced a number of striking traumas as a child, all of which are likely to have had destructive consequences for his emotional and psychological development." JA 207. Among these "striking traumas," Pina listed Banks' being "beaten and terrorized by his alcoholic father; at least one such beating involved young Delma's being tied to a tree and whipped." JA 207. Dr. Pina's presentation was concise, but – contrary to the State's arguments – its conciseness made it neither unclear nor inconsiderable.[8]

The State's characterization of Pina as simply "opin[ing] that . . . [Banks] suffered from a 'hyperallergenic' rash which lowered his self-esteem," SB 30, is similarly amiss. What Dr. Pina said (under oath) was that Banks' "chronic raw and bleeding skin and hives . . . had *catastrophic* consequences for Mr. Banks' emotional and psychological development," JA 208 (emphasis in original); that Banks' "severe and chronic dermatological illness . . . had severe traumatic and permanent disabling effects in every area of his physical, emotional, cognitive, and psychological development," JA 207; that "Mr. Banks learned to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore," JA 208; and that as a result of "[r]eject[ion] by his peers and others in the community," Mr. Banks "understandably developed an

[8] Banks' mother's affidavit placed additional evidence of his traumatic childhood abuse before the state court. She reported that because of her husband's "terrible drinking problems" throughout the period of Delma's upbringing, there were repeated occasions when his drunken threats of physical violence terrorized the children and required Mrs. Banks and the children to "run away." JA 186-87.

overwhelming need for acceptance; at the same time, the absence of such acceptance created in him an intense survival guilt and low self-esteem, approaching self-hatred." JA 209.

Although the State describes Dr. Pina's analysis of Banks' mental functioning as limited to an opinion that "Banks's intelligence was below normal," Dr. Pina in fact supplied abundant information supporting Banks' claim that his trial lawyer was ineffective in failing to "arrange for his evaluation by a mental health professional, despite the fact that [attorney] Cooksey had to slowly and carefully, and often repeatedly, explain various preliminary stages of court proceedings to Mr. Banks." JA 158. Dr. Pina found that Banks' "present intellectual functioning, as measured by the Stanford-Binet IQ test . . . is in the borderline mentally retarded range (73)," JA 205, and that Banks' short-term memory also fell into "the mentally retarded range," JA 205. Dr. Pina observed that "neurological testing indicates that Mr. Banks suffers from an organic brain impairment." JA 209. Finally, Dr. Pina described how Banks' "borderline mental retardation and learning disability" intersected with Banks' severe, chronic skin disorder, making it more difficult for Banks to understand "his painful and tragic experience." JA 209.

2. Demetra Jefferson's affidavit

Vetrano Jefferson's prosecution testimony at Banks' sentencing hearing depicted Banks as the author of a savage attack on Jefferson, striking Jefferson with a pistol and threatening to kill him. In state habeas, Banks proffered the affidavit of Demetra Jefferson, Vetrano's sister, which provided a very different version of this domestic dispute. Demetra's proffer stated that "Vetrano told Delma Jr. that he [Vetrano] would hit [her] if he wanted to, regardless of whether [she] was pregnant" but "when he [Vetrano] was about to, Delma Jr. pulled a gun out of his pants pocket and hit Vetrano in the face with it, to keep him from hitting [her]." JA 194. The State

asks this Court to disregard that information "[b]ecause Jefferson testified that Banks pistol-whipped him *without provocation* during trial, and Banks himself confirmed it." SB 32 (emphasis added). In fact, neither the testimony of Jefferson nor the testimony of Banks addressed the question of provocation. Both were silent concerning the context of the dispute. JA 105, 135-36. It is precisely that lack of context which would have led reasonable counsel to investigate a question upon which his client's sentence of life or death might turn. The full story, fairly presented in state habeas, and then again in federal habeas, illuminates the Jefferson affair in a way that would have been profoundly helpful to a jury seeking to evaluate Banks' moral culpability. *See* § B.2. *infra* pp. 10-11.

B. Banks' evidence at the federal hearing altered neither the legal claim previously considered by the state court nor its factual basis

A comparison of the evidence proffered before the state court and that introduced at the federal hearing shows no substantial alteration of the claim or its factual nucleus:

1. Dr. Cunningham's testimony

Where Dr. Pina had described the "striking trauma" of Banks being "beaten and terrorized by his alcoholic father," JA at 207, Dr. Cunningham testified to the "climate of physical abuse and emotional terrorization by his father," JA 351, "who was alcoholic, violent and abusive . . . ." JA 350. Dr. Cunningham was able to elaborate in an evidentiary hearing in a way that Dr. Pina could not do in an affidavit. But any additional facts presented in no way affronted the exhaustion requirement because Banks fairly presented the substance of his claim – factually as well as legally – to the state courts. *See Vasquez v. Hillery*, 474 U.S. 254, 258 (1986).

Contrary to its current position, the State never made an issue in any evidentiary forum below of the contents of Banks'

factual showing of the mitigation case neglected by his trial counsel. It urged the state post-conviction court to deny the claim without taking evidence. So the state court held no hearing and made no findings; it simply concluded summarily that counsel had provided effective assistance at all phases of the trial. In federal court, the State did not object to Cunningham's testimony on exhaustion grounds; and despite notice of the evidentiary hearing, it chose not to subpoena any witnesses to contest Banks' factual case.

Collectively, the affidavits of Dr. Pina and Dr. Cunningham, bolstered by the affidavits of Banks' mother and father, centered on identical, critical themes of Banks' life: the abuse he endured at the hands of his alcoholic father; the lifelong chronic skin pain and disfigurement he experienced and the crippling humiliation and isolation that produced; and, finally, the powerful combination of borderline intellectual functioning and other serious neurological deficits that impaired his ability to cope with this constellation of traumas.

2. Vetrano Jefferson's testimony

Vetrano Jefferson's testimony was entirely consistent with what Banks had proffered in state habeas – namely, a dramatically different version of the State's single-episode case in aggravation. Taking on the State's transparent strategy of keeping mum about the cause of the fight between Banks and Vetrano Jefferson, Banks alleged in state and federal habeas that reasonably diligent trial counsel would have investigated the immediate context of this domestic dispute and, discovering that Banks had acted to defend his pregnant common-law wife, would have so informed the jury.

Demetra Jefferson's proffer and Vetrano Jefferson's testimony served the self-same end: they provided the precipitating circumstances – the story that was never discovered or told by Banks' trial counsel – of the altercation

which the State put forward as proving Banks' future dangerousness in support of its case for death.[9] Demetra Jefferson and Vetrano Jefferson both made clear that Vetrano had begun the fight and that Banks was acting to defend his common-law wife from her brother's drunken rage. Their identical accounts, first proffered in state court and then proved in federal court, completely undercut the impression that the State labored to create at trial – and that the State now asserts in this Court as fact – namely, that "Jefferson testified that Banks pistol-whipped him *without provocation* during trial, and Banks himself confirmed it," SB 32 (emphasis added). Disabused of that impression, the jury could have considered fairly whether Banks' defense of his pregnant common-law wife established future dangerousness deserving death.

C. The mitigating evidence was sufficient to establish prejudice

The State contends in this Court that the mitigating evidence neglected by Banks' trial counsel is unreliable and insufficient to establish *Strickland* prejudice. Both contentions are faulty.

The State's argument that Dr. Cunningham's testimony is unreliable because it is based on hearsay is specious. Cunningham explained the sources of all of his expert opinion testimony, and the State never once objected to any of it on hearsay grounds. Equally specious is the State's contention that Cunningham's testimony concerning Banks' many traumatic

[9] "We saw Vetrano Jefferson, and he comes in and says on April 7th, he received a scar that I think all of you could see from where you were sitting, on his left cheekbone. He received that scar at the hands of Delma Banks from a pistol-whipping. He further states that when he left the house, that Delma Banks threatened to kill him, and that his sister had to come in and break it up. Delma Banks admits that, unquestionably." JA 140. "The testimony of Vetrano Jefferson . . . is of the utmost significance. Vetrano brought before you the scar on his face, put there by Delma Banks. Vetrano is part of Delma's family. He was pistol-whipped." JA 146.

experiences is unreliable because those traumas were not confirmed by Banks' parents. The State had unlimited opportunity to cross-examine Dr. Cunningham and Banks' parents but made no effort to raise its present quibbles with them. The Magistrate Judge, seeing and hearing their testimony, credited it. 5FH 1111-1113. There is no reason whatsoever for this Court to doubt that credibility assessment.

And had the jury been confronted with Banks' considerable evidence in mitigation – had it heard how Banks' alcoholic father physically abused and terrorized him repeatedly; how his life was defined by the social rejection, humiliation and isolation caused by his oozing, open sores; how he lacked the mental capacity to come to terms with this world of physical and psychological terrorization and trauma – there is a reasonable probability that it would have returned with a different sentence. For, apart from the largely discredited and recanted testimony of Robert Farr and the altercation with Vetrano Jefferson – now cast in a wholly new light by the knowledge of who and what provoked that altercation – virtually nothing remained of the State's case for death beyond the crime itself. It can hardly be supposed that this radical inversion of mitigation and aggravation would have made no difference to a jury.[10]

III. The Charles Cook Claim Was Properly Before the District Court

The State argues that (A) Banks did not articulate a *Brady* claim based on Cook's pretrial rehearsal transcript until after the federal evidentiary hearing, so the State never had adequate

[10]See the discussion of [*Terry*] *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) in our opening brief at pp. 31-33. The State's effort to distinguish *Wiggins* on the ground that official records confirmed Wiggins' mitigating evidence, SB 37, ignores the fact that Wiggins' social service records "contain no mention of [the] sexual abuse" that was a core component of Wiggins's case in mitigation. *Id.* at 2539.

notice that the *Brady* claim which Banks pleaded included this aspect; (B) FRCP 15(b), authorizing trial of unpleaded issues by consent of the parties, is categorically incompatible with habeas corpus practice; and (C) the suppressed Cook transcript contains only insignificant impeachment material. The record refutes the State's position on points (A) and (C); and its point (B) rests upon a faulty premise regarding the pre-AEDPA habeas rules applicable to Banks' case.

A. The record shows that State's counsel understood the Cook *Brady* claim included impeachment evidence in the suppressed rehearsal transcript

The record flatly belies the State's argument that Banks smuggled the rehearsal-transcript nondisclosure claim into his case by articulating it only after the evidentiary hearing. From the time Banks supplemented his discovery request with Cook's affidavit – which asserted, *inter alia*, that Cook's trial testimony was heavily rehearsed and inaccurate – the State's counsel manifestly understood that Banks' pleaded *Brady* claim was a general one and *not* (as the State now asserts) limited to a contention that Cook had testified pursuant to an undisclosed deal. Both parties in the district court had this understanding prior to the evidentiary hearing;[11] both used the hearing to litigate the circumstances of suppression of the Cook rehearsal transcript.

In response to an order asking the parties to identify the issues for evidentiary hearing, Banks replied that he was seeking a hearing on his claim that "the prosecution withheld critical exculpatory and impeachment evidence concerning at least two important state witnesses, Charles Cook and Robert Farr." JA 300. He supported this request with declarations from Cook and four other state witnesses, arguing that the

[11]Indeed, the State's answer to Banks' petition indicates that State's counsel read the petition to allege a general claim of suppression of impeachment evidence, and denied that claim. 1FH 204-05, 207.

evidence proffered in the declarations "leaves little doubt that state misconduct deprived the jury of critical material concerning Mr. Cook and Mr. Farr's credibility." JA 308. Describing the significance of the new evidence for his *Brady* claim as to Cook, Banks asserted that Cook's declaration *both* "puts to rest the issue of whether he [Cook] testified pursuant to an understanding . . ." *and also* "affirms that much of the most prejudicial testimony he offered at trial was not the truth and that much of this testimony was furnished to him by authorities." *Id.*

Thereafter, the Magistrate Judge ordered limited discovery and set forth the issues to be tried at the hearing. The order required the State to disclose chief investigator Huff's entire investigative file as well as portions of the prosecution file concerning, *inter alia*, witness Charles Cook, "including but not limited to . . . preparation notes, interview notes, and all other written or recorded documentation." 2FH 621. The Court further ordered disclosure of the prosecution file "possessing information regarding discussions between Bowie County District Attorney's office and any Dallas County, Texas official regarding Charles Cook and his participation as a witness . . . ." *Id.* This order plainly directed disclosure of material that would be relevant to both a "deal," and other impeachment evidence. Consistent with the discovery order, the court held that one of the claims it would address at a hearing was "whether Petitioner's Fourteenth Amendment rights were violated by the state witholding (*sic*) impeachment evidence concerning two of the state's essential witnesses, Charles Cook and Robert Farr." JA 345.

From the issuance of these orders throughout the hearing, the parties adopted the court's terminology in speaking about the claims to be tried at the hearing. When Banks furnished his witness list for the hearing, he identified witnesses who would testify with regard to "the due process claim involving state

suppression of exculpatory evidence and presentation of evidence that was misleading and inaccurate." 3FH 673. After receiving discovery and obtaining the transcript of Cook's suppressed pretrial statement, Banks filed a motion to compel discovery and requested a copy of the audio tape of the interview. 3FH 697. The State opposed this discovery request as unnecessary and asserted that the text of the transcript revealed that a prosecutor and investigator Huff "were present during the statement and that it was made a few days before the trial." 3FH 726. And in papers filed to obtain discovery for itself, the State sought greater clarification about which defense witnesses would testify as to each issue, saying that Banks "has raised numerous distinct ineffective assistance of counsel claims and *several Brady claims*" (emphasis added). 3FH 729. Both sides indicated that they would use the transcript in their cases concerning the suppression and misrepresentation claims.

At the hearing, trial prosecutor Elliott was questioned extensively by both sides about the circumstances and content of the transcript. At one point, the State's counsel acknowledged that Banks "has made several allegations that – has presented documents making allegations that Mr. Charles Cook was instructed on how to testify in this case[.]" FH Tr. 55.[12] Elliott denied that law enforcement had planted facts in Cook's testimony; this assertion was challenged by Banks with reference to material in the transcript. FH Tr. 664-66. After

[12]Cook's affidavit, proffered during federal habeas, stated that he spoke with Banks' investigator after concluding that "I could no longer conceal that much of my trial testimony was not true. It was a scripted event that was forced upon me by . . . Huff and the trial prosecutors. . . . While at the station [before trial], I gave a statement that was incomplete and inaccurate in numerous respects . . . . Shortly after my incarceration [on pending arson charges], I was taken . . . to the Bowie County jail for the first of several pretrial practice sessions. Huff and the two trial prosecutors were present. They made it very clear that this case was very important, that I would testify as they wanted me to, and that I would spend the rest of my life in prison if I did not. They repeatedly told me how to say things, and insisted repeatedly that I testify about events that were not true." JA 323, 324, 325.

having considered the substance of the transcript – which established beyond dispute that Cook had been extensively prepped for his testimony – Elliott acknowledged that Cook's testimony denying such prepping was not true and should have been corrected. FH Tr. 74.[13]

After the hearing, the parties filed post-hearing briefs, and later, proposed findings of fact and conclusions of law. The post-hearing briefs focused largely upon the issue whether *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), forbade the judge to consider any of the testimony presented at the hearing. In this brief, Banks referred specifically to the transcript as evidence supporting and proving his *Brady* claim regarding Cook. He stated: "Court ordered discovery dislodged from the prosecutor's files a lengthy pretrial statement law enforcement officials extracted from Mr. Cook that had not been previously disclosed to Mr. Banks. It contains a wealth of impeaching information and supports Mr. Cook's hearing testimony that his key trial testimony was coached and inaccurate. This important document was suppressed at trial and throughout later state court proceedings." JA 360. The State never objected to these and other similar arguments[14] as expanding the pleaded *Brady* claim, even after Banks filed proposed findings and conclusions which offered extensive argument on the merits of this claim. JA 373, 378-91.

[13]At the hearing, the transcript was used by the parties only to address the issue whether it contained impeachment material and whether it showed that Cook's testimony was rehearsed and he had been instructed how to testify. Neither party used it to address the separate issue whether Cook testified pursuant to an undisclosed deal.

[14]Later in the same brief he asserted: "We now know that the state suppressed at trial, and withheld from all subsequent state proceedings, a long recorded statement Mr. Cook made to authorities days prior to trial that contains a wealth of impeachment material as well as corroboration of Mr. Cook's present testimony that his trial testimony was coached, much of it was not true, and that his overriding motivation to testify against Mr. Banks was to secure dismissal of the pending Dallas arson charge and habitual offender papers." JA 365.

The State is simply wrong to assert that suppression of the Cook transcript became a claim only after the hearing. Disclosure of the transcript provided important new evidence to prove Banks' pleaded claim. The circumstances leading to its discovery, the dialogue between the court and parties before the hearing, and the prominent treatment given the transcript at the hearing all show that the State knew before the hearing that Banks' *Brady* claim encompassed suppression of the transcript and that the transcript was admissible evidence to prove this claim.

B. FRCP 15(b) is consistent with the relevant pre-AEDPA habeas practice

The State asserts that Rule 15(b) is generally inconsistent with habeas practice because its application would allow habeas petitioners to try unexhausted issues without the respondent's express waiver of exhaustion. In cases governed by AEDPA, this argument would have some force because AEDPA's 28 U.S.C. § 2254(b)(3) forbids a finding that exhaustion has been waived unless the State expressly waives the requirement. However, this provision of AEDPA stands in stark contrast to the pre-AEDPA law allowing federal habeas courts to deem the exhaustion requirement waived through the State's "failure to raise nonexhaustion in the district court," *Granberry v. Greer*, 481 U.S. 129, 130 (1987), "whether inadvertently or otherwise," *id.* at 134. It is of course undisputed that Banks' case is a pre-AEDPA case, *see Lindh v. Murphy*, 521 U.S. 320 (1997); and under pre-AEDPA law, there was absolutely no inconsistency between Rule 15(b) and exhaustion doctrine.[15] Federal courts could apply 15(b) in the usual manner and simultaneously apply the exhaustion rules of *Granberry* by denying relief either on the merits or for nonexhaustion, at the

[15]That is doubtless why this Court's pre-AEDPA cases assumed that Rule 15(b) applies in habeas proceedings, *see Withrow v. Williams*, 507 U.S. 680, 695-96 (1993), and that its application there is "noncontroversial," *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969).

court's discretion. *See Granberry*, 481 U.S. at 136 ("[T]he general rule of exhaustion is not rigid and inflexible . . . the cases in which the nonexhaustion defense is not asserted in the district court may present a wide variety of circumstances which the courts of appeals, drawing on their familiarity with state criminal practice, are able to evaluate individually") (internal quotation marks and citation omitted). Here, the State never actually argues that Banks' *Brady* claim relating to the Cook transcript is unexhausted. Rather, the State argues that, as a general, theoretical matter, Rule 15(b) and exhaustion are incompatible. As *Granberry* makes plain, this abstract, categorical argument is untenable under pre-AEDPA law applicable to Banks' case.

Nor, on Banks' own record, *could* the State tenably argue that either his *Brady* claim relating to the Cook transcript or the evidence supporting that claim is unexhausted. Banks pleaded a Cook-related *Brady* violation in state habeas and requested discovery, JA 152, thereby satisfying the requirements of claim exhaustion. As for evidentiary exhaustion under *Keeney v. Tamayo-Reyes*, 504 U.S. at 9-10, Banks was thwarted by the State's persistent, deliberate concealment of the Cook transcript, which prevented him from relying on it to support his claim in state court. *See* [*Michael*] *Williams v. Taylor*, 529 U.S. at 443-44. Banks thus presents an even clearer case of exhaustion than Michael Williams did. In *Williams*, the Court excused a federal habeas petitioner for neither pleading his claim of juror bias or developing the facts that supported it in the state courts, because the relevant facts were concealed through implicit misrepresentations by the potentially biased juror and the prosecutor during *voir dire*, and Williams' efforts to get at the facts by generalized postconviction requests for discovery and a hearing were stonewalled by the prosecution and rebuffed by the state court. *See id.* at 442-43. Here, Cook explicitly lied on direct examination by the prosecution at trial, falsely denying that he had rehearsed his testimony with law

enforcement officials or discussed it with anyone before trial, JA 63-64; the prosecutor, knowing that this was a lie calculated to conceal impeachment evidence, let the lie go uncorrected, *id.*; Banks nonetheless pleaded a *Brady* claim in state habeas, asserting *inter alia* that the State had withheld impeachment evidence relating to Cook, JA 152; the State stonewalled, and the state habeas court rebuffed Banks' requests for both discovery and an evidentiary hearing on this claim. Banks made every effort Williams made and more to develop his Cook-related *Brady* claim in the state courts, and he was more egregiously hoodwinked by the prosecution and denied "a full and fair hearing"[16] in the state post-conviction process.

C. The impeachment evidence in Cook's rehearsal transcript is material

The State relies upon a single point in arguing that Cook's rehearsal transcript is insufficiently material to warrant relief under *Brady*: it says that the inconsistencies between the transcript and Cook's testimony are insubstantial. *See* SB 46-49.

This is not merely wrong – as we demonstrate at pages 43-50 of our opening brief – but astonishing. One has only to read the 74-page rehearsal transcript through to perceive with unmistakable clarity that the lawyers who prosecuted Delma Banks on behalf of the State of Texas labored long and painstakingly to twist Charles Cook's testimony into the shapes they desired *because* they were convinced that he stood no chance of being believed if he testified as he appeared likely to testify without such twisting. The transcript is clearly material for impeachment purposes because, *inter alia*:

(1) The State's case for capital murder rested largely upon Cook's being viewed as reliable and credible, as the prosecutor told the jury in his opening statement. *See* 9R 2128-29.

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[16] *Keeney*, 504 U.S. at 10.

(2) Suppression of the rehearsal transcript allowed the prosecutors to assure the jury in closing argument that Cook's lie about no rehearsal of his testimony was the truth.

(3) The rehearsal transcript shows:

(a) that Cook's earlier (April) statement to the police – that was disclosed to the defense and which Cook's trial testimony was assiduously tailored to fit – was the product of Cook's fear that he would be charged in this case;

(b) that Cook had been drinking prior to giving the April statement; and,

(c) that the police had fed Cook important information about the crime before Cook's April statement.[17]

(4) And the State also ignores – now, although not when its prosecutors carefully manicured Charles Cook to play the part of their key witness – the many weaknesses of the State's case without Cook.[18] The prosecution had no custodial statement from Banks; it had no witnesses to the crime; it could not tie any proceeds of the crime to Banks. If the jury was not sold on Cook's credibility, it could find no other evidence sufficient to support conviction of capital murder. Cook's rehearsal transcript demonstrates that the prosecutors knew this all too well.

CONCLUSION

The decision of the court below should be reversed.

[17] *See* our opening brief at p. 14.

[18] Additionally, the victim's car was having electrical problems on the evening of April 11 that prevented it from running for very long before dying, and it would then require a jump start. A certified mechanic tstified that given these problems, it was most unlikely that the car could have made a 180-mile journey during the wee hours of the morning without significant repair that was not then available. JA 212-13; 2SH 149.

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